Supreme Court, U.S.
FILED
JUN 24 1991
OFFICE OF THE CLERK

No. 90-1749

In The

Supreme Court of the United States

October Term, 1990

TRAILER MARINE TRANSPORT CORPORATION,

Petitioner,

v.

ZAPATA GULF MARINE CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF

JOSEPH N. MOLE *
EDWARD F. KOHNKE, IV
GEORGE FRAZIER
LEMLE & KELLEHER
601 Poydras Street
21st Floor, Pan-American Life Center
New Orleans, Louisiana 70130
Telephone: (504) 586-1241

Attorneys for Respondent Zapata Gulf Marine Corporation

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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No. 90-1749

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October Term, 1990

TRAILER MARINE TRANSPORT CORPORATION,

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v.

ZAPATA GULF MARINE CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF

REASONS FOR BRIEF

Respondent Zapata Gulf Marine Corporation ("Zapata") submits this Supplemental Brief pursuant to Rules 15.1 and 15.7. The Supplemental Brief is concerned exclusively with matters inaccessible to Zapata when it filed its Brief in Opposition to the Petition. Zapata believes they demonstrate misstatements of fact and law that bear directly upon the issues the Petition purports to present. The Supplemental Brief should serve to clarify (i) the particular post-trial motion at issue in *Fisher v. Klein*, 873 F.2d 626 (2d Cir. 1989), and (ii) the characterization of

recent authority in the Reply Brief filed by Petitioner Trailer Marine Transport Corporation ("TMT").

PROPOSITION I

One of the principal premises of the Petition is that this case and *Fisher v. Klein*, 873 F.2d 626 (2d Cir. 1989), created a split in the circuits when they "held that a motion for sanctions is a Rule 59(e) motion. . . ." (Reply Brief at 1.) This case certainly did not do so, but Zapata was unable to refute TMT's treatment of *Fisher v. Klein* because the Court of Appeals' opinion in the case is perfunctory, and Zapata's attempts to obtain the record from the archives in New York City were unsuccessful. Zapata has now acquired some of the record in *Fisher v. Klein* through correspondence with counsel involved in the case and retention of a firm to retrieve microfiche from the archives. The materials obtained demonstrate that TMT's characterization of the case is inaccurate. The post-trial motion in *Fisher v. Klein* sought clarification or revision of a judgment awarding sanctions. As such, the motion was unquestionably one to alter or amend the judgment, and was properly found to nullify a notice of appeal filed before the motion was decided.

On August 12, 1988, the district court issued a Memorandum dismissing the complaint, awarding sanctions in an amount to be determined, and directing defendants to submit a proposed form of judgment and affidavits quantifying sanctions. *Fisher v. Klein*, No. 88 Civ. 3367

(LFM), slip op. at 6-7 (S.D.N.Y. Aug. 12, 1988). The unreported Memorandum is reproduced as Appendix A to this Brief.

Judgment dismissing the complaint but awarding sanctions to fewer than all defendants was entered on November 3, 1988. The Judgment is reproduced as Appendix B. Counsel for the three defendants not awarded sanctions then filed a Notice of Motion to Alter or Amend Judgment. The Notice stated that it sought an Order under Rule 59(e) based on the annexed affidavit of counsel, which specified that (i) counsel had previously submitted the detailed records of fees and costs requested by the court "on behalf of the three defendants making this motion," (ii) the Judgment awarded sanctions to all but those three defendants and did not indicate why they were omitted, and (iii) thus, a formal motion requesting that the court "set forth whether or not sanctions are to be awarded" in favor of movers was made "pursuant to the court's direction." Affidavit of Edward A. Meilman ¶¶ 3-5. The Notice and Affidavit are reproduced as Appendix C. The Amended Judgment correcting the list of those awarded sanctions was entered on December 21, 1988, and is reproduced as Appendix D.

Because the Judgment awarded sanctions, the motion to clarify, correct, or expand that award was by definition one "to alter or amend the judgment" as that phrase is used in Federal Rule of Appellate Procedure 4(a)(4). Moreover, the motion did "seek revision of the judgment", and was thus a Rule 59(e) motion under the test proposed by TMT. (Reply Brief at 7.)

Two things follow from consideration of the entries and filings in *Fisher v. Klein*. *First*, the Court of Appeals' action was proper. *Second*, the case did not involve a motion for sanctions in the sense used by TMT. (*E.g.*, Reply Brief at 2-3.)

Accordingly, *Fisher v. Klein* represents neither a wrong decision nor disagreement among the circuits. The case presents factual rather than legal issues, and has no meaning out of context. Certainly, the ruling contains none of the elements specified in Rule 10.1.

PROPOSITION II

In *Fineman v. Armstrong World Industries, Inc.*, No. 84-3837 (D.N.J. May 6, 1991), the district court denied prejudgment interest under the Clayton Act at the same time it granted "simple pre-judgment interest pursuant to N.J. Ct.R. 4:42-11(b). . . . " Slip op. at 5. TMT concludes from this that lower "[c]ourts have no difficulty discerning the sharp distinction between sanctions in the form of Clayton Act prejudgment interest and traditional, equitable prejudgment interest." (Reply Brief at 9.) The distinction is elusive, for prejudgment interest under Clayton Act § 4(a) is discretionary while interest under New Jersey law is mandatory in all but the most "exceptional cases":

> [T]he court *shall*, in tort actions, including products liability actions, include in the judgment simple interest at 8% per annum on the amount of the award from the date of the institution of the action or from a date 6 months after the date of the tort, whichever is later, *provided that in*

> *exceptional cases the court may suspend the running of such prejudgment interest. . . .*

Civil Practice Rules Governing the Courts of the State of New Jersey, Rule 4:42-11(b) (emphasis added).

Consequently, TMT's authoritative assertion that "[t]he court in *Fineman* had no difficulty whatever in distinguishing between prejudgment interest as a sanction and prejudgment interest as compensation" (Reply Brief at 9) is simply wrong. *First*, and most obviously, if the district court drew any distinction, it was between discretionary and mandatory prejudgment interest. *Second*, the purported distinction between prejudgment interest under the state rule and the Clayton Act illustrates the inadequacy of the Petition. What is important is, not whether New Jersey imposes mandatory prejudgment interest, but the fact that under TMT's thesis, courts will have to decide the purpose and character of every provision for prejudgment interest, whether it be imposed by statute, court rule, or case law.[1] What, for example, is a court to do with a provision mandating prejudgment interest *except* when a plaintiff delays?[2] Is prejudgment interest compensation if awarded but a

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[1] Even the lucid language of the New Jersey Rule is subject to dispute. *Compare Martin Marietta Corp. v. New Jersey Nat'l Bank*, 505 F.Supp. 946 (D.N.J.), *aff'd as modified*, 653 F.2d 779 (3rd Cir. 1981), *with Hild v. Bruner*, 496 F.Supp. 93 (D.N.J. 1980).

[2] The New Jersey rule has been so interpreted. *E.g., Espin v. Allergan Pharmaceutical, Inc.*, 127 N.J. Super. 496, 317 A.2d 779 (1973).

sanction if denied? If so, what is the effect on a notice of appeal under Federal Rule of Appellate Procedure 4(a)(4)?[3]

CONCLUSION

TMT's use of *Fisher v. Klein* to demonstrate confusion in the lower courts and its choice of *Fineman* as an example of the certainty and consistency embodied in its approach to post-trial motions is hardly felicitous. *Fisher v. Klein* is unusual and irrelevant, and *Fineman* is just another demonstration of the difficulties inherent in deviating from the bright-line rule drawn by the Court in *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), and *Budinich v. Becton Dickson & Co.*, 486 U.S. 196 (1988). The state of the law should not be confused for the convenience of a particular litigant. The Petition ought to be denied.

Respectfully submitted,

JOSEPH N. MOLE *
EDWARD F. KOHNKE, IV
GEORGE FRAZIER
LEMLE & KELLEHER
601 Poydras Street
21st Floor, Pan-American Life Center
New Orleans, Louisiana 70130
Telephone: (504) 586-1241

Attorneys for Respondent Zapata Gulf Marine Corporation

June 24, 1991

* Counsel of Record

[3] There are a number of problematic enactments. *E.g.*, N.M. Stat. § 56-8-4(B); Ohio Rev. Code § 1343.03(C); Pennsylvania Rule of Civil Procedure 238.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OBADIAH FISHER, Plaintiff, -against- SUSAN KLEIN et al., Defendants.	88 Civ. 3367 (LFM) MEMORANDUM

MacMAHON, District Judge.

Defendants American Express Co., American Express Travel Related Services Co., Inc. ("AMEX"), Alexander Kush ("Kush") and A. Kush & Associates, Ltd. ("AKA") separately move to dismiss the "complaint for declaratory judgment" filed by plaintiff Obadish Fisher ("Fisher") and for an order, pursuant to Rule 11, Fed.R.Civ.P., and 28 U.S.C. § 1927 (1982), awarding costs, attorneys' fees, and injunctive relief against plaintiff and his attorney, John R. Tobiason ("Tobison").

BACKGROUND

On May 13, 1988, Fisher commenced this action, claiming that a declaratory judgment on an agreement (the "Fisher/Columbia Agreement") with defendant Columbia Jewelry Contractors, Inc. ("Columbia") would establish infringement of his copyright for zodiac pendants by the defendants. Recounting some of the extensive procedural history of the two previous related

actions brought by Fisher in this court[1] demonstrates why the instant action must be dismissed and why sanctions are appropriate.

Fisher was a plaintiff in *Ronald Litoff, Ltd. v. American Express Co.*, 83 Civ. 9432 (LFM), an action brought by Fisher's licensee and manufacturer of the zodiac pendants against AMEX and AKA for infringement of copyright. On November 18, 1986, summary judgment was entered against Fisher and his co-plaintiffs on all claims involving the zodiac pendents, based on their failure to raise any genuine issue of material fact in support of the infringement claims.

On December 11, 1986, Fisher commenced another action,[3] *Fisher v. Klein*, 86 Civ. 9522 (LFM) ("Fisher I"), against AMEX, AKA, his co-plaintiffs in *Litoff*, and certain individual defendants, alleging copyright infringement and other claims with respect to the zodiac pendants and five other pendants.

Meanwhile, on February 9, 1987, after unsuccessfully trying to appeal the judgment,[4] Fisher moved to vacate the *Litoff* judgment based on certain "new evidence" which he claimed raised factual issues precluding summary judgment. The new evidence consisted of the Fisher/Columbia Agreement, motion papers previously submitted by Columbia, and a third party's affidavit claiming to have purchased a zodiac pendant in late 1982. We denied Fisher's motion to vacate the *Litoff* judgment on April 23, 1987, concluding that "[t]he 'new evidence' which Fisher relies upon fails to demonstrate that any infringement occurred or that an unauthorized sales promotion was conducted."[5]

Subsequently, in response to motions by various defendants in *Fisher I* to dismiss and for sanctions, the complaint was dismissed for failing to allege facts concerning registration of copyrights to the various pendants.[6] The dismissal was without prejudice to filing an amended complaint, although Fisher and his counsel were urged to "carefully consider their obligations under Rule 11, Fed.R.Civ.P." before doing so. Fisher filed an amended complaint, realleging his infringement claims for four pendants, including the zodiac pendants, and defendants renewed their motions to dismiss the complaint.

By memorandum and order dated February 3, 1988, we granted summary judgment to all *Fisher I* defendants on plaintiff's zodiac pendant claims on the ground that the claims were barred by res judicata. We also granted summary judgment to AMEX, AKA, Kush, and Susan Klein ("Klein") on two other pendants due to Fisher's failure to allege any factual basis for copyright infringement and defendants' unequivocal denial of such conduct. Plaintiff's state law claims to copyright ownership against Klein were also dismissed for the three pendants. We denied summary judgment with respect to the fourth pendant, the family roots pendant, because Fisher asserted personal knowledge of an unauthorized promotion by AMEX and AKA. Finally, we reserved decision on defendants' motions for sanctions until discovery was completed on Fisher's family roots pendant claims.

On March 29, 1988, Fisher failed to appear at his scheduled deposition, and, after some discussion, Tobiason stipulated to dismiss with prejudice his client's remaining family roots pendant claims against AMEX

and AKA.[8] On March 30, 1988, an order granting summary judgment to the other defendants was issued on all claims. Shortly thereafter, Fisher moved for a declaratory judgment in *Fisher I* on the Fisher/Columbia Agreement, objected to entry of any judgment dismissing AMEX and AKA as parties in *Fisher I*, and instituted the instant action for declaratory judgment on the Fisher/Columbia Agreement (*"Fisher II"*).

DISCUSSION

Motion to Dismiss

The actions of Fisher and his attorney in this litigation constitute a frontal assault on the doctrine of res judicata, "a rule of fundamental and substantial justice, 'of public policy and of private peace.' "[9] Plaintiff continues to press an argument that we have rejected three times,[10] *i.e.*, that AMEX and AKA infringed plaintiff's copyright by selling zodiac pendants under the Fisher/Columbia Agreement. Even if plaintiff's argument had any merit (and we believe that it does not),[11] we are foreclosed from considering it. The application of the principles of res judicata to Fisher's zodiac pendant claims has been discussed fully in prior decisions and need not be repeated here.[12]

Accordingly, the motions of AMEX and AKA to dismiss the instant action are granted as to them and, *sua sponte*, to all other defendants.

Sanctions

Plaintiff's refusal to abide by the decisions of this court warrants sanctions under both 28 U.S.C. § 1927 and Rule 11. Section 1927 provides, in part, that "any attorney . . . who so multiples the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." A clear showing of bad faith is required before sanctions may be imposed under § 1927.[13] Defendants AMEX and AKA have made such a showing.

Plaintiff's bad faith clearly appears in a number of instances. Each adverse decision has been ignored, reargued, and circumvented by filing additional actions or motions. Particularly egregious examples of plaintiff's conduct include: (1) filing a second action for copyright infringement of the zodiac pendant while seeking to vacate the adverse judgment in the first action; (2) after entry of summary judgment against him on three pendants and avoiding summary judgment on the fourth by claiming personal knowledge of infringing activity in *Fisher I*, Fisher failed to appear at a deposition concerning the fourth pendant; instead, his attorney agreed to dismiss the claims against AMEX and AKA with prejudice. Plaintiff then opposed entry of final judgment in favor of AMEX and AKA, despite the absence of any viable claim against them; (3) after entry of summary judgment in favor of all but a few individual defendants in *Fisher I*, plaintiff filed a "motion for declaratory judgment" on the Fisher/Columbia Agreement. Before the return date of that motion, plaintiff filed *Fisher II*, the instant action for a declaratory judgment on the Agreement.

Plaintiff's conduct, at least from the time of the memorandum and order granting summary judgment to AMEX and AKA in *Fisher I*, also violated Rule 11. The subsequent papers signed by Tobiason were not "warranted by existing law or a good faith argument for the extension, or reversal of existing law." Rather, they were interposed to harass, delay, and increase the cost of defending this frivolous litigation.

"It is especially appropriate to impose sanctions where the doctrines of *res judicata* and collateral estoppel plainly preclude relitigation of the suit."[14] Similar patterns of reasserting claims that have been rejected by the court have resulted in sanctions against plaintiffs and their attorneys.[15] Accordingly, sanctions are warranted.

Defendants request (1) reimbursement of their attorneys' fees and costs to compensate them for plaintiff's past abuses, and (2) entry of an order permanently enjoining plaintiff from commencing any judicial proceeding based on the same claim, to prevent future abuses. We conclude that monetary sanctions should be imposed against Tobiason and Fisher jointly, but that injunctive relief is not warranted at this time. Injunctive relief against abusive litigants has been granted when other sanctions have proven ineffective.[16] Plaintiff has not been sanctioned previously in this court, and defendants offer no reason why monetary sanctions would not adequately deter future violations of § 1927 and Rule 11.

CONCLUSION

Accordingly, the complaint is dismissed as to all defendants on the merits, and sanctions are awarded

against Fisher and Tobiason in an amount to be determined subsequently. Defendants, therefore, are directed to submit, within ten (10) days, affidavits and contemporaneous time records detailing fees and costs incurred after February 3, 1988, and to submit the form of a judgment, pursuant to Rule 54(b), Fed.R.Civ.P., dismissing plaintiff's claims in both *Fisher v. Klein* actions. Plaintiff shall have ten (10) days thereafter to oppose the amount of sanctions and to present any evidence of financial inability to pay sanctions.

Dated: New York, N. Y.

August 12, 1988

/s/ Lloyd F. MacMahon
LLOYD F. MacMAHON
United States
District Judge

Fisher v. Klein et al. – 88 Civ. 3367 (LFM)

FOOTNOTES

---

[1] Fisher has also pursued an action in state court, *Fisher v. Klein*, No. 07102/87 (Supreme Court, New York County).

[2] *Ronald Litoff, Ltd. v. American Express Co.*, 621 F. Supp. 981, 983-84 (S.D.N.Y. 1985).

[3] In *Litoff*, Fisher originally appeared pro se. He was represented by Cheryl Fax-Davidson, Esq., beginning February 15, 1985. Tobiason began representing Fisher in August 1986 in *Litoff* and represented him from the outset in *Fisher v. Klein*, 86 Civ. 9522.

[4] Fisher repeatedly sought to appeal the judgment in *Litoff* before it became final.

[5] *Ronald Litoff, Ltd. v. American Express Co.*, 83 Civ. 9432 (LFM) (S.D.N.Y. Apr. 23, 1987). The decision also denied defendants' motions for sanctions.

[6] *Fisher v. Klein*, 86 Civ. 9522 (LFM) (S.D.N.Y. July 13, 1987). The substantive grounds for defendants' motions – lack of standing, improper joinder, and res judicata – were not considered because of the threshold jurisdictional issue.

[7] *Fisher v. Klein*, 86 Civ. 9522 (LFM) (S.D.N.Y. Feb. 3, 1988).

[8] Fisher's failure to appear at his scheduled deposition is the subject of a separate motion by AKA for sanctions against plaintiff. The discussion herein applies to that motion as well.

[9] *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917).

[10] *Ronald Litoff, ltd. v. American Express Co., supra*, 621 F. Supp. at 984 (opinion granting summary judgment); *Ronald Litoff, Ltd. v. American Express Co.*, 83 Civ. 9432 (LFM) (S.D.N.Y. Apr. 23, 1987) (endorsement denying Fisher's motion to vacate judgment); *Fisher v. Klein*, 86 Civ. 9522 (LFM) (S.D.N.Y. Feb. 3, 1988) (memorandum and order granting summary judgment to all defendants on the ground that Fisher's claims were barred by res judicata).

[11] The Fisher/Columbia Agreement provided, in part, that:

> "8. Based on a September 1981 market test, this Agreement shall commerce on September 1, 1981. If American Express rolls forward with a full mailing after the market test, this contract shall continue to remain in effect for as long as American Express markets the Pendants. Columbia must notify Susan Obie, in writing, of the start-up and end of all American Express mailings and the status of the orders from these mailings. Susan Obie will honor American Express exclusivity during the time they are marketing the Pendants. If American Express, after the market test, does not market the Pendant, then the term of this Agreement shall be deemed to have commenced on or about September 1, 1981 and shall continue for one year expiring on August 31, 1982. During this period, Columbia must notify Susan Obie in writing of all its sales of the Pendants. It is understood that Susan Obie shall receive royalties on any payments for the sales of the Pendants received by Columbia after the termination of this Agreement. When the Agreement ends, either on August 31, 1982 or when American Express stops selling the Pendants, Columbia shall own the physical molds. Columbia understands that even if they do not return the molds and models they will not be able to use them, since Susan Obie holds the copyright.
>
> * * *
>
> 12. Except as herein otherwise expressly provided, upon the termination of this Agreement, whether by the expiration of the term hereof, or cancellation, or for any other cause whatsoever, the license herein granted and all right of Columbia to the use of the copyright and the sale of the pendants shall cease and terminate forthwith. Upon such termination, Columbia shall discontinue and abandon the use of

> the copyright; and shall cease to represent or advertise that it is in any way connected with Susan Obie. Notwithstanding such termination, Columbia shall have the right to fulfill and make delivery of all orders received by it prior to such termination and, for such purpose, to use the copyright in the manner herein before set forth, provided, however, that Columbia shall pay royalties thereon."

Fisher has contended throughout this litigation that the October 1982 marketing infringed his copyright to the pendants because it was unauthorized by these paragraphs. We rejected that contention summarily in the *Litoff* case. It is undisputed that AMEX did "roll[] forward with a full mailing" of the pendants. The unambiguous language of the Fisher/Columbia Agreement, therefore, provides that "the contract . . . continue[d] to remain in effect for as long as American Express market[ed] the Pendants." No unauthorized promotion took place.

[12] *Fisher v. Klein*, 86 Civ. 9522 (LFM) (S.D.N.Y. Feb. 3, 1986) (memorandum and order granting partial summary judgment, at 3-7).

[13] *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1373 (1987).

[14] *McLaughlin v. Bradlee*, 602 F.Supp. 1412, 1417 (D.D.C. 1985), *aff'd*, 803 F.2d 1197 (D.C. Cir. 1986).

[15] *See, e.g., Record Club of America, Inc. v. Credit Services, Inc.*, 117 F.R.D. 359, 361 (S.D.N.Y. 1987); *Rand v. Anaconda-Ericsson, Inc.*, 625 F.Supp. 176, 184 (E.D.N.Y. 1985); *Andre v. Merrill Lynch Ready Assets Trust*, 97 F.R.D. 699, 702 (S.D.N.Y. 1983).

[16] *See In re Martin Trigona*, 737 F.2d 1254, 1261-62 (2d Cir. 1984) (injunctive relief against abusive litigant upheld when his impending bankruptcy made monetary sanctions fruitless).

APPENDIX B

DOC # 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OBADIAH FISHER, Plaintiff, – against – SUSAN KLEIN, JAMES BENEDETTO, COLUMBIA JEWELRY CONTRACTORS, INC., COLUMBIA ORIGINALS, INC., RONALD LITOFF, RONALD LITOFF, INC., ALEXANDER KUSH. A. KUSH & ASSOCIATES, LIMITED, AMERICAN EXPRESS COMPANY, AMERICAN EXPRESS TRAVEL RELATED SERVICES, INC., "JOHN DOE" (fictitious name), and "JOHN DOE, INC." (fictitious name), Defendants.	88 Civ. 3367 (LFM) JUDGMENT #88,2182 FILED NOV 3 1988

This action having come on by motion before the court, Honorable Lloyd F. MacMahon, District Judge, presiding; and judgment dismissing the claims of plaintiff Obadiah Fisher against defendants, American Express Company, American Express Travel Related Services Co., Inc., Susan Klein, Alexander Kush, A. Kush & Associates, Limited, James Benedetto, Columbia Jewelry Contractors, Inc., Columbia Originals, Inc., Ronald Litoff, and Ronald

Litoff, Inc., having been granted by Memorandum dated August 12, 1988, now, therefore

IT IS ORDERED, ADJUDGED, AND DECREED that plaintiff Obadiah Fisher take nothing, and that his action against defendants, American Express Company, American Express Travel Related Services Co., Inc., Susan Klein, Alexander Kush, A. Kush & Associates, Limited, James Benedetto, Columbia Jewelry Contractors, Inc., Columbia Originals, Inc., Ronald Litoff, and Ronald Litoff, Inc., be dismissed in its entirety, with prejudice and on the merits; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that sanctions in the amount of $15,769.13 be awarded against plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., jointly and severally, in favor of defendants, American Express Company and American Express Travel Related Services Co., Inc.; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that sanctions in the amount of $1,825.00 be awarded against plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., in favor of defendants, James Benedetto, Columbia Jewelry Contractors, Inc., Columbia Originals, Inc., Ronald Litoff, and Ronald Litoff, Inc.; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that receipts for payment of the above sanctions, duly signed by defendants herein, shall be filed by plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., with the Clerk of the court within twenty (20) days; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, if plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., fail to comply with the foregoing terms of this order, defendants shall submit, within twenty (20) days of such non-compliance, an order permanently enjoining plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., from filing any further actions or proceedings in this court involving the copyrights on the pendants described in the complaint filed in this action.

Dated: New York, N. Y.
November 3, 1988

/s/ Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 11-4-88.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RECEIVED 11-14-88 MD

OFFICE OF THE CLERK
US DISTRICT COURT, SDNY

OBADIAH FISHER,
Plaintiff,
v.
SUSAN KLEIN, et al.,
Defendants.

DOC # 21

88 Civ. 3367 (LFM)

NOTICE OF MOTION TO ALTER OR AMEND JUDGMENT

FILED
NOV 14 1988

PLEASE TAKE NOTICE that upon the annexed affidavit of Edward A. Meilman, Esq. sworn to on November 9, 1988 and upon all the papers and proceedings heretofore had herein, the undersigned as attorney for Alexander Kush, A. Kush & Associates Ltd. and Susan Klein will move this court before the Honorable Lloyd F. MacMahon, United States District Judge, in Room 1505, United States Courthouse, Foley Square, New York, New York 10007 at 9:30 A.M. on November 22, 1988 or as soon thereafter as counsel can be heard, for an Order pursuant to Rule 59(e) of the Federal Rules of Civil Procedure amending and altering the judgment dated November 3, 1988 to set forth whether or not sanctions are to be awarded against plaintiff Obadiah Fisher and his attorney John R. Tobiason, Esq., jointly and severally, in favor of

the moving defendants and if such sanctions are to be awarded, the amount thereof.

Dated: New York, New York
November 9, 1988

/s/ Edward A. Meilman
Edward A. Meilman, Esq.
OSTROLENK, FABER, GERB
& SOFFEN
Attorney for Defendants
Alexander Kush et al.
1180 Avenue of the Americas
New York, New York 10036
(212) 382-0700

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

OBADIAH FISHER,

Plaintiff,

v.

SUSAN KLEIN, et al.,

Defendants.

88 CIV. 3367 (LFM)

----------X

State of New York)
) ss.:
County of New York)

AFFIDAVIT OF EDWARD A. MEILMAN

EDWARD A. MEILMAN being duly sworn deposes and says:

1. I am a member of the bar of this court and of the State of New York and am the attorney for the defendants Alexander Kush, A. Kush & Associates Ltd. and Susan Klein in the above captioned action. I submit this Affidavit in support of the motion of the aforesaid defendants pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend the judgment of this court dated November 3, 1988.

2. By Memorandum issued August 12, 1988, this court dismissed the Complaint as to all defendants on the merits and indicated sanctions were to be awarded against Obadiah Fisher and John Tobiason in an amount to be subsequently determined. The court directed all

defendants to submit within 10 days affidavits and contemporaneous time records detailing fees and costs incurred after February 3, 1988.

3. On August 22, 1988 the undersigned submitted a affidavit and contemporaneous time records detailing fees and costs on behalf of the three defendants making this motion. A true copy of that affidavit with its exhibits is attached hereto for the convenience of the court as Exhibit A.

4. In the Judgment issued by this court on November 3, 1988 the court issued sanctions against plaintiff and his attorney Mr. Tobiason in favor of all defendants except Alexander Kush, A. Kush & Associates Ltd. and Susan Klein. The Judgment is silent and therefore also does not indicate whether the court had determined that no sanctions should be awarded to these defendants.

5. I respectfully submit that the court should alter or amend the Judgment of November 3, 1988 to set forth whether or not sanctions are to be awarded against Obadiah Fisher and John Tobiason in favor of defendants Alexander Kush, A. Kush & Associates Ltd. and Susan Klein, and if so in what amount. This request is being made by formal motion rather than by letter or telephone

inquiry pursuant to this court's direction contained in the letter of the court dated November 2, 1988.

/s/ Edward A. Meilman
EDWARD A. MEILMAN

Sworn to before me this 9th day
of November, 1988.

/s/ Irene SooHoo
Notary Public

IRENE SOOHOO
Notary Public, State of New York
No. 31-4754327
Qualified in New York County
Commission Expires October 31, 1989

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OBADIAH FISHER, Plaintiff, – against – SUSAN KLEIN, JAMES BENEDETTO, COLUMBIA JEWELRY CONTRACTORS, INC., COLUMBIA ORIGINALS, INC., RONALD LITOFF, RONALD LITOFF, INC., ALEXANDER KUSH, A. KUSH & ASSOCIATES, LIMITED, AMERICAN EXPRESS COMPANY, AMERICAN EXPRESS TRAVEL RELATED SERVICES, INC., "JOHN DOE" (fictitious name), and "JOHN DOE, INC." (fictitious name), Defendants.	DOC # 25 88 Civ. 3367 (LFM) AMENDED JUDGMENT FILED DEC 21 1988 #88,2585

This action having come on by motion before the court, Honorable Lloyd F. MacMahon, District Judge, presiding; and judgment dismissing the claims of plaintiff Obadiah Fisher against defendants, American Express Company, American Express Travel Related Services Co., Inc., Susan Klein, Alexander Kush, A. Kush & Associates, Limited, James Benedetto, Columbia Jewelry Contractors, Inc., Columbia Originals, Inc., Ronald Litoff, and Ronald Litoff, Inc., having been granted by Memorandum dated August 12, 1988, now, therefore,

IT IS ORDERED, ADJUDGED, AND DECREED that plaintiff Obadiah Fisher take nothing, and that his action against defendants, American Express Company, American Express Travel Related Services Co., Inc., Susan Klein, Alexander Kush, A. Kush & Associates, Limited, James Benedetto, Columbia Jewelry Contractors, Inc., Columbia Originals, Inc., Ronald Litoff, and Ronald Litoff, Inc., be dismissed in its entirety, with prejudice and on the merits; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that sanctions in the amount of $15,769.13 be awarded against plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., jointly and severally, in favor of defendants, American Express Company and American Express Travel Related Services Co., Inc.; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that sanctions in the amount of $1,825.00 be awarded against plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., in favor of defendants, James Benedetto, Columbia Jewelry Contractors, Inc., Columbia Originals, Inc., Ronald Litoff, and Ronald Litoff, Inc.; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that sanctions in the amount of $6,803.30 be awarded against plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., in favor of defendants, Alexander Kush and A. Kush & Associates, Limited; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that receipts for payment of the above sanctions, duly signed by defendants herein, shall be filed by plaintiff Obadiah Fisher and his attorney, John R.

Tobiason, Esq., with the Clerk of the court within twenty (20) days; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, if plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., fail to comply with the foregoing terms of this order, defendants shall submit, within twenty (20) days of such non-compliance, an order permanently enjoining plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., from filing any further actions or proceedings in this court involving the copyrights on the pendants described in the complaint filed in this action.

Dated: New York, N. Y.
December 21, 1988

/s/ Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 12-22-88.